

ARTICLE 6A

GRIEVANCE PROCEDURE FOR STATE EMPLOYEES

Section

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ALR References. Rights of state and municipal public employees in grievance proceedings, 46 ALR4th 912.

Applicability. - The grievance board has no authority to resolve a criminal matter. *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

An action brought under this act, the Human Rights Act, is not barred if it previously was presented to the grievance board by the same parties and involved the same facts and circumstances. The grievance board had no preclusive effects over human rights claims. *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

Procedure for misclassification grievances. - Where a civil service employee is required by his employer to perform duties that are outside of his civil service classification such employee, if he wishes to file a grievance, must do so pursuant to this article. *AFSCME v. Civil Serv. Comm'n*, 181 W. Va. 8, 380 S.E.2d 43 (1989).

West Virginia Educational Employees Grievance Board. - A final order of the hearing examiner for the West Virginia Educational Employees Grievance Board, made pursuant to §§ 18-29-1, et seq., and based upon findings of fact, should not be reversed unless clearly wrong. *Hazelwood v. Mercer County Bd. of Educ.*, 200 W. Va. 205, 488 S.E.2d 480 (1997).

29-6A-1. Purpose.

The purpose of this article is to provide a procedure for the equitable and consistent resolution of employment grievances raised by nonelected state employees who are classified under the state civil service system, or employed in any department, other governmental agencies, or by independent boards or commissions created by the Legislature, with the exception of employees of the board of regents [abolished], state institutions of higher education, the Legislature, any employees of any constitutional officer unless they are covered under the civil service system, and members of the department of public safety [West Virginia state police].

[1988, c. 62.]

Editor's Notes. The bracketed words were inserted by the editor. As for the board of regents, see §§ 18B-1-3, 18B-1-4 for change of name. As for the department of public safety, see § 15-2-2 for change of name.

Legislative intent. - The Legislature intended to place in the Education and State Employees Grievance Board jurisdiction over matters arising from a misapplication or misinterpretation regarding hours, terms and conditions of employment. This terminology is sufficiently broad to cover a grievance for work performed out of classification. *State Dep't of Admin. v. West Virginia Dep't of Health & Human Resources/Division of Health*, 192 W. Va. 202, 451 S.E.2d 768 (1994).

Applicability. - An employee of a county health department who is a member of the state merit system is subject to the grievance procedures for state employees and may accordingly file grievances pursuant to this Act before the West Virginia Education and State Employees Grievance Board. *State Dep't of Admin. v. West Virginia Dep't of Health & Human Resources/Division of Health*, 192 W. Va. 202, 451 S.E.2d 768 (1994).

No preclusive effect - Plaintiff's litigation of her sexual discrimination grievances with the West Virginia education and state employees grievance board had no preclusive effect upon her rights under the West Virginia Human Rights Act. *Harrison County Bd. of Educ. v. Carson-Leggett*, 195 W. Va. 596, 466 S.E.2d 447 (1995).

Applied in *Barthelemy v. West Virginia Div. of Cors.*, - W. Va. -, 535 S.E.2d 201 (W. Va. 2000).

Quoted in *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997).

Stated in *District 1199 WV/KY/OH Nat'l Union of Hosp. & Health Care Employees v. West Virginia Dep't of Health*, 180 W. Va. 506, 377 S.E.2d 498 (1988).

Cited in *Randolph County Bd. of Educ. v. Scalia*, 182 W. Va. 289, 387 S.E.2d 524 (1989); *Parsons v. West Virginia Bureau of Emp. Programs*, 189 W. Va. 107, 428 S.E.2d 528 (1993); *Casdorph v. West Virginia Dep't of Energy*, 189 W. Va. 132, 428 S.E.2d 553 (1993); *West Virginia Dep't of Natural Resources v. Myers*, 191 W. Va. 72, 443 S.E.2d 229 (1994); *Ohio County Bd. of Educ. v. Hopkins*, 193 W. Va. 600, 457 S.E.2d 537 (1995).

29-6A-2. Definitions.

For the purpose of this article:

(a) "Board" means the education employees grievance board created in section five [§ 18-29-5], article twenty-nine, chapter eighteen of this code and hereafter known as the education and state employees grievance board.

(b) "Chief administrator" means the commissioner, director or head of any state department, board, commission or agency.

(c) "Days" means working days exclusive of Saturday, Sunday or official holidays.

(d) "Discrimination" means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by

the employees.

(e) "Employee" means any person hired for permanent employment, either full or part-time, by any department, agency, commission or board of the state created by an act of the Legislature, except those persons employed by the board of regents [abolished] or by any state institution of higher education, members of the department of public safety [West Virginia state police], any employees of any constitutional officer unless they are covered under the civil service system and any employees of the Legislature. The definition of "employee" shall not include any patient or inmate employed in a state institution.

(f) "Employee organization" means any employee advocacy organization whose membership includes employees as defined in this section which has filed with the board the name, address, chief officer and membership criteria of the organization.

(g) "Employer" means that state department, board, commission or agency utilizing the services of the employee covered under this article.

(h) "Favoritism" means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.

(i) "Grievance" means any claim by one or more affected state employees alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of their employer; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees.

Any pension matter or other issue relating to public employees insurance in accordance with article sixteen [§§ 5-16-1 et seq.], chapter five of this code, retirement, or any other matter in which authority to act is not vested with the employer shall not be the subject of any grievance filed in accordance with the provisions of this article.

(j) "Grievance evaluator" means that individual authorized to render a decision on a grievance under procedural levels one, two and three as set out in section four [§ 29-6A-4].

(k) "Grievant" means any named employee or group of named employees filing a grievance as defined in subsection (i) of this section.

(l) "Harassment" means repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.

(m) "Hearing examiner" means the individual or individuals employed by the board in accordance with section five [§ 29-6A-5] of this article.

(n) "Immediate supervisor" means that person next in rank above the grievant possessing a

degree of administrative authority and designated as such in the employee's contract, if any.

(o) "Representative" means any employee organization, fellow employee, legal counselor or other person or persons designated by the grievant as the grievant's representative.

(p) "Reprisal" means the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.

[1988, c. 62.]

Editor's Notes. The bracketed words in (e) were inserted by the editor. As for the board of regents, see §§ 18B-1-3, 18B-1-4 for change of name. As for the department of public safety, see § 15-2-2 for change of name.

Jurisdiction. - The jurisdiction of the Education and State Employees Grievance Board is limited to the resolution of grievances as defined by this section and § 18-29-2(a); the grievance board did not have jurisdiction to order the appellant to implement shift trading policies. *Skaiff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997).

Employer. - A state civil service employee was not precluded from litigating a claim of tortious interference with an employment contract against a private manager and administrator in civil court even though she had previously argued in an administrative proceeding before the grievance board that the defendants had recommended terminating her; the defendants were not subject to the jurisdiction of the grievance board, and it had no jurisdiction over the employee's claim against them. *Asaad v. Res-Care, Inc.*, 197 W. Va. 684, 478 S.E.2d 357 (1996).

Favoritism. - The term "favoritism," defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees," is not meant to supplant the concept of "equal pay for equal work" in § 29-6-10. *West Virginia Dep't of Health & Human Resources v. Hess*, 189 W. Va. 357, 432 S.E.2d 27 (1993).

Grievance evaluator. - The term "grievance evaluator" is defined in subsection (j) to mean an "individual authorized to render a decision on a grievance under procedural levels one, two and three as set out in § 29-6A-4"; thus, the final level of the grievance procedure where alteration of the substance of a grievance under § 29-6A-3(j) can occur is at Level III. *West Virginia Dep't of Health & Human Resources v. Hess*, 189 W. Va. 357, 432 S.E.2d 27 (1993).

Applied in *Barthelemy v. West Virginia Div. of Cors.*, - W. Va. -, 535 S.E.2d 201 (W. Va. 2000).

Quoted in *District 1199 WV/KY/OH Nat'l Union of Hosp. & Health Care Employees v. West Virginia Dep't of Health*, 180 W. Va. 506, 377 S.E.2d 498 (1988); *AFSCME v. Civil Serv. Comm'n*, 181 W. Va. 8, 380 S.E.2d 43 (1989); *Parsons v. West Virginia Bureau of Emp. Programs*, 189 W. Va. 107, 428 S.E.2d 528 (1993); *State Dep't of Admin. v. West Virginia Dep't of Health & Human Resources/Division of Health*, 192 W. Va. 202, 451 S.E.2d 768 (1994); *Harrison County Bd. of Educ. v. Carson-Leggett*, 195 W. Va. 596, 466 S.E.2d 447 (1995).

29-6A-3. Grievance procedure generally.

(a) (1) A grievance shall be filed within the times specified in section four [§ 29-6A-4] of this article and shall be processed as rapidly as possible. The number of days indicated at each level

specified in section four of this article is the maximum number of days allowed and, if a decision is not rendered at any level within the prescribed time limits, the grievant may appeal to the next level. Provided, That the specified time limits shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause necessitating the grievant to take personal leave from his or her employment.

(2) Any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing. The grievant prevails by default if a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud. Within five days of the receipt of a written notice of the default, the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong. In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of that presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted to comply with the law and to make the grievant whole.

(b) If the employer or its agent intends to assert the application of any statute, policy, rule or written agreement or submits any written response to the filed grievance at any level, a copy of the materials shall be forwarded to the grievant and any representative of the grievant named in the filed grievance. Anything submitted and the grievant's response to the submitted materials, if any, becomes part of the record. Failure to assert the statute, policy, rule or written agreement at any level does not prevent the subsequent submission of the materials in accordance with the provisions of this subsection.

(c) The grievant may file the grievance at the level vested with authority to grant the requested relief if each lower administrative level agrees in writing to filing the grievance at a higher level. In the event a grievance is filed at a higher level, the employer shall provide copies to each lower administrative level.

(d) An employee may withdraw a grievance at any time by notice, in writing, to the level where the grievance is then current. The grievance may not be reinstated by the grievant unless reinstatement is granted by the grievance evaluator at the level where the grievance was withdrawn. If more than one employee is named as grievant in a particular grievance, the withdrawal of one employee does not prejudice the rights of any other employee named in the grievance. In the event a grievance is withdrawn or an employee withdraws from a grievance, the employer shall notify, in writing, each lower administrative level.

(e) Grievances may be consolidated at any level by agreement of all parties.

(f) A grievant may be represented by an employee organization representative, legal counsel or any other person, including a fellow employee, in the preparation or presentation of the grievance. At the request of the grievant, that person or persons may be present at any step of the

procedure: Provided, That at level one of the grievance, as set forth in section four of this article, a grievant may have only one representative.

(g) If a grievance is filed which cannot be resolved within the time limits set forth in section four of this article prior to the end of the employment term, the time limit shall be reduced as agreed to in writing by both parties so that the grievance procedure may be concluded within ten days following the end of the employment term or an otherwise reasonable time.

(h) No reprisals of any kind may be taken by any employer or agent of the employer against any interested party, or any other participant in the grievance procedure by reason of the participation. A reprisal constitutes a grievance, and any person held responsible for reprisal action is subject to disciplinary action for insubordination.

(i) Decisions rendered at all levels of the grievance procedure shall be dated, in writing setting forth the decision or decisions and the reasons for the decision, and transmitted to the grievant and any representative named in the grievance within the time prescribed. If the grievant is denied the relief sought, the decision shall include the name of the individual at the next level to whom appeal may be made.

(j) Once a grievance has been filed, supportive or corroborative evidence may be presented at any conference or hearing conducted pursuant to the provisions of this article. Whether evidence substantially alters the original grievance and renders it a different grievance is within the discretion of the grievance evaluator at the level where the new evidence is presented. If the grievance evaluator rules that the evidence renders it a different grievance, the party offering the evidence may withdraw it, the parties may consent to the evidence, or the grievance evaluator may decide to hear the evidence or rule that the grievant must file a new grievance. The time limitation for filing the new grievance is measured from the date of the ruling.

(k) Any change in the relief sought by the grievant shall be consented to by all parties or may be granted at level four within the discretion of the hearing examiner.

(l) Forms for filing grievances, giving notice, taking appeals, making reports and recommendations, and all other necessary documents shall be made available by the immediate supervisor to any employee upon request. The forms shall include information prescribed by the board. The grievant shall have access to the employer's equipment for purposes of preparing grievance documents subject to the reasonable rules of the employer governing the use of the equipment.

(m) Notwithstanding the provisions of section three [§ 6-9A-3], article nine-a, chapter six of this code, or any other provision relating to open proceedings, all conferences and hearings pursuant to this article shall be conducted in private except that, upon the grievant's request, conferences and hearings at levels two and three shall be open to employees of the grievant's immediate office or work area or, at the request of the grievant, shall be public. Within the discretion of the hearing examiner, conferences and hearings may be public at level four.

(n) No person may confer or correspond with a hearing examiner regarding the merits of the

grievance unless all parties to the grievance are present.

(o) Grievances shall be processed during regular working hours. Attempts shall be made to process the grievance in a manner which does not interfere with the normal operation of the employer.

(p) The grievant or the employee selected by a grievant to represent him or her in the processing of a grievance through this procedure, or both, shall be granted necessary time off during working hours for the grievance procedure without loss of pay and without charge to annual or compensatory leave credits. In addition to actual time spent in grievance conferences and hearings, the grievant or the employee representative, or both, shall be granted time off during working hours, not to exceed four hours per grievance, for the preparation of the grievance without loss of pay and without charge to annual or compensatory leave credits. However, the first responsibility of any state employee is the work assigned by the appointing authority to the employee. An employee may not allow grievance preparation and representation activities to seriously affect the overall productivity of the employee.

(q) The aggrieved employee, employing agency and representatives of both have the right to call, examine and cross-examine witnesses who are employees of the agency against which the grievance is lodged and who have knowledge of the facts at issue.

(r) Both parties may produce witnesses other than employees of the agency against which the grievance is lodged, and the witnesses are subject to examination and cross-examination.

(s) If an employer or the employer's agent causes a conference or hearing to be postponed without adequate notice to employees who are scheduled to appear during their normal work day, the employees may not suffer any loss in pay for work time lost.

(t) Any grievance evaluator may be excused from participation in the grievance process for reasonable cause, including, but not limited to, conflict of interest or incapacitation, and if this occurs the grievance evaluator at the next higher level shall designate an alternative grievance evaluator if it is reasonable and necessary.

(u) No less than one year following resolution of a grievance at any level, the grievant may by request in writing have removed any record of the grievant's identity from any file kept by the employer.

(v) All grievance forms and reports shall be kept in a file separate from the personnel file of the employee and may not become a part of the personnel file, but shall remain confidential except by mutual written agreement of the parties.

(w) The number of grievances filed against an employer or agent or by an employee is not, per se, an indication of the employer's or agent's or the employee's job performance.

(x) Any chief administrator with whom a grievance is filed may appeal a level four decision on the grounds that the decision:

- (1) Is contrary to law or a lawfully adopted rule or written policy of the employer;
- (2) Exceeds the hearing examiner's statutory authority;
- (3) Is the result of fraud or deceit;
- (4) Is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (5) Is arbitrary or capricious or characterized by abuse of discretion.

The appeal shall follow the procedure regarding appeal provided the grievant in section four of this article and provided both parties in section seven [§ 29-6A-7] of this article.

[1988, c. 62; 1998, c. 160.]

Effect of Amendment of 1998 The amendment, effective July 1, 1998, in (a), added (2); in (b) and (x)(1), deleted "regulation" following "rule"; in (g), deleted "set forth in said section" following "the time limit"; in (p), deleted "it shall be understood by all parties that" in the next-to-last sentence, and rewrote the last sentence; and made stylistic changes.

Involvement of division of personnel. - The division of personnel has the discretion of becoming a party at level three of the grievance procedure for state employees, and as a party at level three of the grievance procedure, the consent of the division of personnel is needed before the relief requested can be modified under subsection (k). *Parsons v. West Virginia Bureau of Emp. Programs*, 189 W. Va. 107, 428 S.E.2d 528 (1993).

Copies of grievance documents and hearing transcript. - An aggrieved employee has the right to use, free of charge, the employer's copy machine for the purpose of copying grievance documents and the transcript of the employment grievance hearing. *District 1199 WV/KY/OH Nat'l Union of Hosp. & Health Care Employees v. West Virginia Dep't of Health*, 180 W. Va. 506, 377 S.E.2d 498 (1988).

Treatment of new grievances. - Subsection (j) requires a grievance evaluator to determine if the evidence being offered presents a new grievance; if a new grievance is found to exist, the evaluator can decide to hear the evidence or rule that the grievant must file a new grievance, or the parties may consent to such evidence. *West Virginia Dep't of Health & Human Resources v. Hess*, 189 W. Va. 357, 432 S.E.2d 27 (1993).

Final grievance procedure. - The term "grievance evaluator" is defined in § 29-6A-2(j) to mean an "individual authorized to render a decision on a grievance under procedural levels one, two and three as set out in § 29-6A-4"; thus, the final level of the grievance procedure where alteration of the substance of a grievance under subsection (j) can occur is at Level III. *West Virginia Dep't of Health & Human Resources v. Hess*, 189 W. Va. 357, 432 S.E.2d 27 (1993).

Jurisdiction. - The division of personnel has no jurisdiction to hear or decide misclassification grievances at level three of the grievance procedure for state employees set forth in §§ 29-6A-1 et seq., except in those instances where the division of personnel is the employing agency. *Parsons v. West Virginia Bureau of Emp. Programs*, 189 W. Va. 107, 428 S.E.2d 528 (1993).

Violation of grievance procedure. - Where a state employee, covered by article 6 or this chapter, has instituted a grievance pursuant to a state personnel grievance procedure and the employee's supervisor violates the grievance procedure, such violation will not result in the reversal of an order by the state civil

service commission affirming the employee's dismissal from employment, where such violation of the grievance procedure is merely technical, following substantial compliance with the procedure, and there has existed between the employee and his supervisors ongoing communications concerning the employee's employment problems. *West Va. Alcohol Beverage Control Admin. v. Scott*, 205 W. Va. 398, 518 S.E.2d 639 (1999), *this is a per curiam opinion*;

Applied in *State Dep't of Admin. v. West Virginia Dep't of Health & Human Resources/Division of Health*, 192 W. Va. 202, 451 S.E.2d 768 (1994); *Harmon v. Fayette County Bd. of Educ.*, 205 W. Va. 125, 516 S.E.2d 748 (1999).

Quoted in *Parsons v. West Virginia Bureau of Emp. Programs*, 189 W. Va. 107, 428 S.E.2d 528 (1993).

29-6A-4. Procedural levels and procedure at each level.

(a) Level one.

Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance. If a grievance alleges discrimination or retaliation by the immediate supervisor of the grievant, the level one filing may be waived by the grievant and the grievance may be initiated at level two with the administrator or his or her designee, within the time limits set forth in this subsection for filing a grievance at level one. A meeting may be held to discuss the issues in dispute, but the meeting is not required.

(b) Level two.

Within five days of receiving the decision of the immediate supervisor, the grievant may file a written appeal to the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency. The administrator or his or her designee shall hold a conference within five days of the receipt of the appeal and issue a written decision upon the appeal within five days of the conference.

(c) Level three.

Within five days of receiving the decision of the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency, the grievant may file a written appeal of the decision with the chief administrator of the grievant's employing department, board, commission or agency. A copy of the appeal and the level two decision shall be served upon the director of the division of personnel by the grievant.

The chief administrator or his or her designee shall hold a hearing in accordance with section six [§ 29-6A-6] of this article within seven days of receiving the appeal. The director of the

division of personnel or his or her designee may appear at the hearing and submit oral or written evidence upon the matters in the hearing.

The chief administrator or his or her designee shall issue a written decision affirming, modifying or reversing the level two decision within five days of the hearing.

(d) Level four.

(1) If the grievant is not satisfied with the action taken by the chief administrator or his or her designee, within five days of the written decision the grievant may request, in writing, on a form furnished by the employer, that the grievance be submitted to a hearing examiner as provided for in section five [§ 29-6A-5] of this article. The hearing shall be conducted in accordance with section six of this article within fifteen days following the request for the hearing: Provided, That the hearing may be held within thirty days following the request, or within a time that is mutually agreed upon by the parties, if the hearing examiner gives reasonable cause, in writing, as to the necessity for the delay. A copy of the appeal shall be served by the grievant upon the director of the division of personnel. The director of the division of personnel, or his or her designee, may appear at the hearing and submit oral or written evidence upon the matters in the hearing.

(2) Within thirty days following the hearing, the hearing examiner shall render a decision in writing to all parties setting forth findings and conclusions on the issues submitted. Subject to the provisions of section seven [§ 29A-6A-7] of this article, the decision of the hearing examiner is final upon the parties and is enforceable in circuit court.

(e) Expedited grievance process.

(1) A grievance involving suspension without pay, demotion or dismissal or loss of wages may be initiated at level two with the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency.

(2) An employee may grieve a final action of the employer involving a dismissal, demotion or suspension exceeding twenty days directly to the hearing examiner. The expedited grievance shall be in writing and shall be filed within ten days of the date of the final action with the chief administrator and the director of the division of personnel.

[1988, c. 62; 1998, c. 160.]

Effect of Amendment of 1998 The amendment, effective July 1, 1998, in (a), added the last two sentences; rewrote (d)(1); in (d)(2), twice substituted "is" for "shall be"; in (e), inserted (1), and redesignated the existing provisions as (2), and in (e)(2), substituted "shall be filed" for "must be filed"; substituted "the division of personnel" for "personnel of the state civil service commission," the "personnel director of the state civil service commission," or a variation thereof; substituted gender-neutral terms throughout; and made stylistic changes.

Time limit for instituting grievance. - Subsection (a) contains a discovery rule exception to the time limits for instituting a grievance. Under this exception, the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance. *Barthelemy v. West Virginia Div. of Cors.*, - W. Va. - , 535 S.E.2d 201 (W. Va. 2000).

Transcripts. - This section does not require that either party obtain a certified copy of the transcript prior to taking an appeal. *District 1199 WV/KY/OH Nat'l Union of Hosp. & Health Care Employees v. West Virginia Dep't of Health*, 180 W. Va. 506, 377 S.E.2d 498 (1988).

Final grievance level. - The term "grievance evaluator" is defined in § 29-6A-2(j) to mean an "individual authorized to render a decision on a grievance under procedural levels one, two and three as set out in § 29-6A-4"; thus, the final level of the grievance procedure where alteration of the substance of a grievance under § 29-6A-3(j) can occur is at Level III. *West Virginia Dep't of Health & Human Resources v. Hess*, 189 W. Va. 357, 432 S.E.2d 27 (1993).

Applied in *State Dep't of Admin. v. West Virginia Dep't of Health & Human Resources/Division of Health*, 192 W. Va. 202, 451 S.E.2d 768 (1994).

Quoted in *AFSCME v. Civil Serv. Comm'n*, 181 W. Va. 8, 380 S.E.2d 43 (1989); *Parsons v. West Virginia Bureau of Emp. Programs*, 189 W. Va. 107, 428 S.E.2d 528 (1993); *Hensley v. State Dep't of Health & Human Resources*, 203 W. Va. 456, 508 S.E.2d 616 (1998).

29-6A-5. Education and state employees grievance board; hearing examiners.

(a) The education employees grievance board, created by virtue of the provisions of section five [§ 18-29-5], article twenty-nine, chapter eighteen of this code, is renamed the education and state employees grievance board and, in addition to those duties set forth in chapter eighteen [§§ 18-1-1 et seq.], shall administer the grievance procedure at level four as provided for in section four [§ 29-6A-4] of this article. The board has jurisdiction regarding procedural matters at levels two and three of the grievance procedure. The board shall employ, in addition to those persons employed as hearing examiners for educational employee grievances, at least two full-time hearing examiners for the purpose of conducting hearings at level four, as provided in section four of this article. The hearing examiners are employed on an annual basis along with the clerical help necessary to implement the legislative intent expressed in section one [§ 29-6A-1] of this article.

In addition to the budget required for submission to the Legislature by virtue of the provisions of section five, article twenty-nine, chapter eighteen of this code, the board shall submit a yearly budget and shall report annually to the governor and the Legislature regarding proceedings conducted under this article, including receipts and expenditures, the number of level four hearings conducted, synopses of hearing outcomes and other information as the board determines appropriate. The board shall further evaluate on an annual basis the level four grievance process and the performance of all hearing examiners and include the evaluation in the annual report to the governor and the Legislature. In making the evaluation the board shall notify all employers, employee organizations, the director of the division of personnel and all grievants participating in level four grievances in the year for which evaluation is being made and shall provide for the submission of written comment or the hearing of testimony regarding the grievance process, or both.

The board shall provide suitable office space for all hearing examiners in space other than that utilized by any employer as defined in section two [§ 29-6A-2] of this article and shall ensure that reference materials are generally available. The board shall provide forms for filing grievances, giving notice, taking appeals, making reports and recommendations and other documents as the

board determines necessary for any stage of a grievance under this article.

The board is authorized to propose rules for promulgation consistent with the provisions of this article, and in accordance with article three [§§ 29A-3-1 et seq.], chapter twenty-nine-a of this code.

(b) Hearing examiners may consolidate grievances, allocate costs among the parties in accordance with section eight of this article, subpoena witnesses and documents in accordance with the provisions of section one [§ 29A-5-1], article five, chapter twenty-nine-a of this code, provide relief as is determined fair and equitable in accordance with the provisions of this article, and take any other action to provide for the effective resolution of grievances not inconsistent with any rules of the board or the provisions of this article: Provided, That in all cases the hearing examiner has the authority to provide appropriate remedies including, but not limited to, making the employee whole.

[1988, c. 62; 1998, c. 160.]

Effect of Amendment of 1998 The amendment, effective July 1, 1998, rewrote the section.

Quoted in Hazelwood v. Mercer County Bd. of Educ., 200 W. Va. 205, 488 S.E.2d 480 (1997).

Cited in Harrison County Bd. of Educ. v. Carson-Leggett, 195 W. Va. 596, 466 S.E.2d 447 (1995).

29-6A-6. Hearings generally.

(a) The chief administrator or his or her designee acting as a grievance evaluator or the hearing examiner shall conduct all hearings in an impartial manner and shall ensure that all parties are accorded procedural and substantive due process. All parties shall have an opportunity to present evidence and argument with respect to the matters and issues involved, to cross-examine and to rebut evidence. Reasonable notice of a hearing shall be sent prior to the hearing to all parties and their named representative and shall include the date, time and place of the hearing. Level one, level two and level three hearings shall be at a convenient place accessible to the aggrieved employee. All hearings shall be held on the employer's premises or on other premises mutually agreeable to the parties and within regular working hours: Provided, That any hearing might continue beyond normal working hours. Level four hearings shall be at a place to be designated by the hearing examiner.

(b) The employer that is party to the grievance shall produce prior to the hearing any documents, not privileged, and which are relevant to the subject matter involved in the pending grievance, that have been requested by the grievant, in writing.

(c) The chief administrator or his or her designee or the hearing examiner has the power to: (1) Administer oaths and affirmations; (2) subpoena witnesses; (3) regulate the course of the hearing; (4) hold conferences for the settlement or simplification of the issues; (5) exclude immaterial, irrelevant or repetitious evidence; (6) sequester witnesses; (7) restrict the number of advocates; and (8) take any other action not inconsistent with the rules of the board or the

provisions of this article.

(d) All the testimony and evidence at any level three or level four hearing shall be recorded by mechanical means, and all recorded testimony and evidence at the hearing shall be transcribed and certified by affidavit. The chief administrator is responsible for promptly providing a copy of the certified transcript of a level three hearing to any party to that hearing who requests the transcript. The hearing examiner may also request and be provided a transcript upon appeal to level four and allocate the costs for the transcript as prescribed in section eight [§ 29-6A-8] of this article. The board is responsible for promptly providing a copy of the certified transcript of a level four hearing to any party to that hearing who requests the transcript.

(e) Formal rules of evidence may not be applied, but parties are bound by the rules of privilege recognized by law. No employee may be compelled to testify against himself or herself in a grievance involving disciplinary action. The burden of proof rests with the employer in disciplinary matters.

(f) All materials submitted in accordance with section three [§ 29-6A-3] of this article; the mechanical recording of all testimony and evidence or the transcription of the testimony, if any; the decision; and any other materials considered in reaching the decision are the record of a grievance. The record shall be submitted to any level at which appeal has been made, and the record shall be considered, but the development of the record is not limited thereby.

(g) Every decision pursuant to a hearing shall be in writing and shall be accompanied by findings of fact and conclusions of law.

(h) Prior to the decision any party may propose findings of fact and conclusions of law.

[1988, c. 62; 1998, c. 160.]

Effect of Amendment of 1998 The amendment, effective July 1, 1998, redesignated the previously undesignated paragraphs as (a) through (h); in (c), deleted "by consent of the parties" in (4), inserted the (8) designation; and deleted "and regulations" following "rules" in (8); and otherwise modified the language, and made stylistic changes.

Duty to hold hearing at worksite. - The employer has a duty to hold the hearing at the worksite unless otherwise agreed to by the parties. *District 1199 WV/KY/OH Nat'l Union of Hosp. & Health Care Employees v. West Virginia Dep't of Health*, 180 W. Va. 506, 377 S.E.2d 498 (1988).

29-6A-7. Enforcement and reviewability; costs; good faith.

(a) The decision of the hearing examiner is final upon the parties and is enforceable in circuit court.

(b) Either party or the director of the division of personnel may appeal to the circuit court of Kanawha County or to the circuit court of the county in which the grievance occurred on the grounds that the hearing examiner's decision:

- (1) Is contrary to law or a lawfully adopted rule or written policy of the employer;
- (2) Exceeds the hearing examiner's statutory authority;
- (3) Is the result of fraud or deceit;
- (4) Is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (5) Is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(c) The appeal shall be filed within thirty days of receipt of the hearing examiner's decision. The decision of the hearing examiner is not automatically stayed upon the filing of an appeal, but a stay may be granted by the circuit court upon separate motion for a stay.

(d) The court's ruling shall be upon the entire record made before the hearing examiner, and the court may hear oral arguments and require written briefs. The court may reverse, vacate or modify the decision of the hearing examiner or may remand the grievance to the appropriate chief administrator for further proceedings.

(e) Both employer and employee shall at all times act in good faith and make every possible effort to resolve disputes at the lowest level of the grievance procedure. The hearing examiner may make a determination of bad faith and in extreme instances allocate the cost of the hearing to the party found to be acting in bad faith. The allocation of costs shall be based on the relative ability of the party to pay the costs.

[1988, c. 62; 1998, c. 160.]

Effect of Amendment of 1998 The amendment, effective July 1, 1998, redesignated the provisions as (a) through (e); in (a), deleted "Provided, That" following "circuit court"; in (b), substituted "director of the division of personnel" for "state civil service commission," and inserted "to the circuit court of Kanawha County or," and in (b)(1), deleted "regulation" following "rule"; in (c), deleted "in the circuit of the county in which the grievance occurred" following "shall be filed"; and otherwise modified the language, and made stylistic changes.

Court review. - A final order of the hearing examiner for the West Virginia education and state employee grievance board, made pursuant to this article and based upon findings of fact, should not be reversed unless clearly wrong. *Quinn v. West Va. N. Community College*, 197 W. Va. 313, 475 S.E.2d 405 (1996).

"Days." - This section, which allows an appeal to the circuit court within 30 days of receipt of the hearing examiner's decision, must be read in pari materia with § 29-6A-2(c), which defines "days" as "working days exclusive of Saturday, Sunday or official holidays." *West Virginia Dep't of Health & Human Resources v. Hess*, 189 W. Va. 357, 432 S.E.2d 27 (1993).

Timeliness of appeal. - Although 32 calendar days elapsed between the department of health and human resources' receipt of the hearing examiner's decision and the filing of its appeal, only 21 working days had elapsed between those dates; consequently, the department filed its appeal within the time limit prescribed in this section. *West Virginia Dep't of Health & Human Resources v. Hess*, 189 W. Va. 357, 432

S.E.2d 27 (1993).

Applied in Roach v. Regional Jail Auth., 198 W. Va. 694, 482 S.E.2d 679 (1996).

Quoted in Hensley v. State Dep't of Health & Human Resources, 203 W. Va. 456, 508 S.E.2d 616 (1998).

Stated in Watts v. West Virginia Dep't of Health & Human Resources/Division of Human Servs., 195 W. Va. 430, 465 S.E.2d 887 (1995).

Cited in Randolph County Bd. of Educ. v. Scalia, 182 W. Va. 289, 387 S.E.2d 524 (1989); Akers v. West Virginia Dep't of Hwys., 188 W. Va. 698, 425 S.E.2d 840 (1992), rev'd on other grounds sub nom. Akers v. Caperton, 998 F.2d 220 (4th Cir. 1993); Parsons v. West Virginia Bureau of Emp. Programs, 189 W. Va. 107, 428 S.E.2d 528 (1993); West Virginia Dep't of Natural Resources v. Myers, 191 W. Va. 72, 443 S.E.2d 229 (1994); Ohio County Bd. of Educ. v. Hopkins, 193 W. Va. 600, 457 S.E.2d 537 (1995).

29-6A-8. Allocation of costs.

Any expenses incurred relative to the grievance procedure at levels one through three shall be borne by the party incurring such expenses.

[1988, c. 62.]

Use of employer's copy machine. - An aggrieved employee has the right to use, free of charge, the employer's copy machine for the purpose of copying grievance documents and the transcript of the employment grievance hearing. District 1199 WV/KY/OH Nat'l Union of Hosp. & Health Care Employees v. West Virginia Dep't of Health, 180 W. Va. 506, 377 S.E.2d 498 (1988).

29-6A-9. Mandamus proceeding.

Any employer failing to comply with the provisions of this article may be compelled to do so by mandamus proceeding and shall be liable to any party prevailing against the employer for court costs and attorney fees, as determined and established by the court.

[1988, c. 62.]

Quoted in Hensley v. State Dep't of Health & Human Resources, 203 W. Va. 456, 508 S.E.2d 616 (1998).

29-6A-10. Employee's right to attorney's fees and costs.

If an employee appeals to a circuit court an adverse decision of a hearing examiner rendered in a grievance proceeding pursuant to provisions of this article or is required to defend an appeal and the person substantially prevails, the adverse party or parties is liable to the employee, upon final judgment or order, for court costs, and for reasonable attorney's fees, to be set by the court, for representing the employee in all administrative hearings and before the circuit court and the supreme court of appeals, and is further liable to the employee for any court reporter's costs

incurred during any administrative hearings or court proceedings: Provided, That in no event shall such attorney's fees be awarded in excess of a total of one thousand five hundred dollars for the administrative hearings and circuit court proceedings nor an additional one thousand dollars for supreme court proceedings: Provided, however, That the requirements of this section shall not be construed to limit the employee's right to recover reasonable attorney's fees in a mandamus proceeding brought under section nine [§ 29-6A-9] of this article.

[1988, c. 62; 1998, c. 160.]

Effect of Amendment of 1998 The amendment, effective July 1, 1998, substituted "appeals" for "shall appeal," "substantially prevails" for "shall substantially prevail," "is" for "shall be," and "one thousand five hundred dollars" for "one thousand dollars"; and made stylistic changes.

Quoted in *Parsons v. West Virginia Bureau of Emp. Programs*, 189 W. Va. 107, 428 S.E.2d 528 (1993).

Cited in *University of W. Va. Bd. of Trustees ex rel. W. Va. Univ. v. Graf*, 205 W. Va. 118, 516 S.E.2d 741 (1999), *this is a per curiam opinion*.

29-6A-11. Application of article.

This article applies to all grievances arising on or after the effective date of this article [July 1, 1988]. This article supersedes and replaces the civil service grievance and appeals procedure currently authorized under the rules and regulations of the Civil Service Commission [state personnel board] upon the resolution of all grievances and appeals pending in the civil service grievance system on the effective date of this article [July 1, 1988].

[1988, c. 62.]

Editor's Notes. The bracketed words were inserted by the editor. See § 29-6-9 for change of name.

Jurisdiction over misclassification grievances. - The state employees grievance board has jurisdiction over matters arising from a "misapplication or misinterpretation regarding . . . hours, terms and conditions of employment," which includes a grievance for work performed out of classification. The Civil Service Commission (now state personnel board) has no jurisdiction to handle such misclassification grievances. *AFSCME v. Civil Serv. Comm'n*, 181 W. Va. 8, 380 S.E.2d 43 (1989).

29-6A-12. Mediation required at request of either party.

Upon the request of either party, the board may require mediation or other alternative dispute resolution technique to assist the parties in identifying, clarifying and resolving issues regarding the grievance. Mediation may be requested at any time prior to the level four hearing. All of the information that is provided by parties during mediation is and shall remain confidential. Mediators may not be called as witnesses to provide testimony in unresolved grievances that proceed to a grievance hearing, and any hearing examiner involved in a mediation process may not hear the grievance or be consulted regarding the merits of the grievance.

[1998, c. 160.]

Effective Dates. Acts 1998, c. 160, provided that the act take effect July 1, 1998.
